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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-570

SOUTHWIRE COMPANY and
SOUTHWIRE REALTY COMPANY,
Petitioners

versus

METAL EQUIPMENT COMPANY
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF GEORGIA

Van C. Wilks
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Attorney for Petitioners

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Carrollton, Georgia 30117

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No.....

SOUTHWIRE COMPANY and
SOUTHWIRE REALTY COMPANY,

Petitioners

versus

METAL EQUIPMENT COMPANY,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF GEORGIA

Petitioners, Southwire Company and Southwire Realty Company, petition for a writ of certiorari to issue to review the decision in this case entered April 17, 1973 on which rehearing was denied on May 9, 1973 and on which application for writ of certiorari was denied by the Supreme Court of Georgia on July 3, 1973.

OPINIONS BELOW

The opinion of the Court of Appeals, printed in the Appendix to this Petition, pages 9-13, is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was dated and entered April 17, 1973. (Appendix, pages 9-13). Rehearing was denied on May 9, 1973. (Appendix, page 14). Writ of Certiorari was denied by the Supreme Court of Georgia on July 3, 1973. (Appendix, page 15). The jurisdiction of this Court is invoked under Title 28 United States Code, Section 1257 (3).

QUESTION PRESENTED FOR REVIEW

Whether a hearing on a motion for summary judgment may be held and judgment rendered in accordance with the hearing without notice to Defendants.

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitutional provisions involved are the due process guarantees of the Fifth Amendment and the Fourteenth Amendment to the United States Constitution, the pertinent portions of which read:

> "No person shall be . . . deprived of life, liberty, or property without due process of law . . ." U. S. Const. amend. V.; and
>
> "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . ." U. S. Const. amend. XIV."

STATEMENT OF THE CASE

The action was initiated on December 30, 1971, when Metal Equipment Company (hereinafter Metal Equipment) filed a complaint in the State Court of Carroll County, Georgia, to foreclose on a materialman's lien filed on October 11, 1971 in the

office of the Carroll County, Georgia, Clerk of Court against the property of Southwire Company and Southwire Realty Company (hereinafter collectively called Southwire). The parties stipulated facts and filed cross motions for summary judgment. Metal Equipment filed its motion on August 31, 1972, and Southwire filed its motion on September 1, 1972. On September 30, 1972, a hearing on the motions was held and plaintiff, Metal Equipment, called a witness and introduced testimony. Southwire had no notice of the hearing. The only possibility of "notice" was served on Southwire on August 31, 1972, and is set out "as received" at Appendix, pages 18-25. The court issued and filed its judgment on October 12, 1972, in accordance with the hearing. (Appendix, pages 16-17). Southwire filed its notice of appeal on November 9, 1972. The appeal was perfected on December 27, 1972. The issues of lack of notice and lack of due process were presented, among others, in the Appeal Brief and Enumeration of Error filed by Southwire to perfect the appeal. The case was heard in the Georgia Court of Appeals on February 13, 1973. The opinion of that court was rendered on April 17, 1973. (See Appendix, pages 9-13). The Court of Appeals refused to deal with the issues of lack of notice and lack of due process. A motion for rehearing was filed on April 26, 1973, and urged reconsideration of the case on the grounds, among others, of lack of notice and due process. The motion for rehearing was denied on May 9, 1973. (See Appendix, page 14).

Notice that Southwire would petition the Supreme Court of Georgia for a writ of certiorari was filed on May 18, 1973. The petition for writ of certiorari was filed on June 8, 1973, on the grounds, among others, that Southwire had been deprived of due process of law because of lack of notice of the hearing. The petition for writ of certiorari was denied on July 3, 1973. (See Appendix, page 15).

REASONS FOR GRANTING THE WRIT

This case involves the opportunity to be heard, one of the basic and fundamental rights which fairness requires be afforded all litigants. The opportunity to be heard, at the very least, includes notice of proceedings and the chance to cross-examine adverse witnesses. Southwire has been denied that fundamental right.

It is clear that an opportunity to be heard and to defend ones' position is an essential element of due process of law. *E. g. Boddie vs. Connecticut,* 401 U. S. 371, 91 Sup. Ct. 780 (1971); *Shelley vs. Kraemer,* 334 U. S. 1, 68 Sup. Ct. 836 (1948). One of the basic and essential factors in affording an opportunity to be heard is notice *reasonably calculated* under *all circumstances* to apprise a person of the proceedings against him. *E. g. Robinson vs. Hanrahan,* _____U. S. _____, 93 Sup. Ct. 30 (1972); *Covey vs. Town of Somers,* 351 U. S. 141 (1956); *Simon vs. Craft,* 182 U. S. 436 (1901).

It is equally clear that a corporation is a "person" within the meaning of the due process clauses of the Fifth and Fourteenth Amendments to the Constitution of the United States. *E. g. Chicago, Rock Island and Pacific Railway Company vs. Arkansas,* 219 U. S. 453 (1908); *Southeastern Promotions, Inc. vs. Conrad,* 341 F. Supp. 465 (D. C. Tenn. 1972). Consequently, Southwire was entitled to the protections of due process of law.

In this case, the "notice" sent to Southwire was clearly constitutionally defective. Copies of the documents comprising the "notice" appear in the Appendix at pages 18-25. The only indication that Southwire could obtain from the documents served upon it was that Metal Equipment intended to have a hearing date set and, by filing such documents, was asking the court to set a date for hearing. There is absolutely no indication in the documents that a hearing date had already been set and that

Southwire was to appear at a time and date certain. The documents contained all blanks. Not a single line was filed out and not a single signature or facsimile thereof was contained on the documents. This "notice" was constitutionally defective under the standards set out by this Court; the "notice" did not even provide defendants with that fundamental fairness essential to the very concept of justice. *E. g. Robinson vs. Hanrahan, supra.*

This Court, historically has defended vigorously against such blatant disregard for a defendant's constitutional rights. Since Southwire was not present at the trial court proceedings, the "notice" issue is not expressly contained in the trial court record. It could not be. The first "notice" Southwire received of the trial court's hearing was a copy of the court's order granting Metal Equipment's motion for summary judgment. The "notice" issue was raised as soon as possible under the circumstances. Yet the Georgia Court of Appeals refused to rule on the issue. That court's refusal to rule deprived Southwire of the very rights that this Court held were "essential to due process" in *Chambers vs. Mississippi,* _____U. S._____, 93 Sup. Ct. 1038 (1973), where this Court stated:

> "A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense--a right to his day in court--are basic to our system of jurisprudence".

In Chambers this Court struck down certain rules of evidence because, in the particular case, the rules operated to deprive a defendant of the fair trial required by our Constitution. Chambers shows that a State cannot relieve itself of the responsibility to provide all litigants with fundamental due process of the law by relying upon State rules of evidence and procedure.

Yet the Georgia courts did the very thing that Chambers forbids--they relied upon State rules regarding content of the record to deprive Southwire of its constitutionally guaranteed

fair trial. This is a case in which the intervention of this Court is required in order to afford the Constitutionally guaranteed rights which have historically been vigorously defended and jealously guarded by this Court.

CONCLUSION

For the foregoing reasons, Petitioners, Southwire Company and Southwire Realty Company, respectfully request that their Petition For A Writ of Certiorari be granted.

Respectfully submitted,

Van C. Wilks
P. O. Box 1000
Carrollton, Georgia 30117
Attorney for Petitioner

Of Counsel:
D. R. Sloan, Jr.
P. O. Box 1000
Carrollton, Georgia 30117

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No.....

SOUTHWIRE COMPANY and
SOUTHWIRE REALTY COMPANY

Petitioners

versus

METAL EQUIPMENT COMPANY

Respondent

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF GEORGIA

Van C. Wilks
P. O. Box 1000
Carrollton, Georgia 30117
Attorney for Petitioners

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IN THE

COURT OF APPEALS OF GEORGIA

No. 47898

SOUTHWIRE COMPANY et al

Appellants

versus

METAL EQUIPMENT COMPANY

Appellee

(April 17, 1973)

PANNELL, Judge. This case is an appeal from the grant of a summary judgment in favor of the lien claimant and against the defendants for materials furnished to a subcontractor for the improvement of real estate in the amount of $22,921.07. HELD

The record shows service of a motion and rule nisi for summary judgment by plaintiff upon defendant's attorney. The record further shows a stipulation of facts to be used on the hearing. The claim, made for the first time in this court, that the copies served upon the defendants' attorney were not filled in as to the time of hearing and for that reason defendants' attorney was not notified of the time of hearing, is not supported by the record and will not be passed upon in this court. See also, *Town of Adel vs. Littlefield,* 149 Ga. 812(2) (102 SE 433).

No affidavit is required to file or foreclose a lien against real estate under Code Sections 67-2002 and 67-2301. The case of *Murphy vs. Fuller,* 96 Ga. App. 403(3) (100 SE2d 137) does not hold to the contrary, nor does *Broxton Artificial Stone Works vs. Jowers,* 4 Ga. App. 91 (60 SE 1012). The case of *Tallman vs. Southern Motor Exchange, Inc.,* 97 Ga. App. 565 (103 SE2d 640) was a foreclosure on personalty under Code Sections 67-2003 and 67-2401, which latter Section in Par. 3, thereof, requires an affidavit of foreclosure; and that case, therefore, has no application here.

Code Section 67-2002(2) providing for the filing for record of a claim of lien against real estate contains a form for such claim. While it requires the name of the claimant to appear, it requires no signature. In *Latham Plumbing & Heating Co. vs. Ledbetter Trucks, Inc.,* 96 Ga. App. 219 (99 SE2d 545) relied upon by appellants, a recorded claim of lien, which recited "the undersigned, Dewel L. Stevens, Jr., an officer of Latham Plumbing & Heating Company" (emphasis by the court) claims a lien, etc., and which was signed "Dewey L. Stevens, Jr." below which appeared "Officer of Latham Plumbing & Heating Company" was, because of the signature which was identical with the recitation in the body, held not to be signed by Latham Plumbing & Heating Company, and therefore, asserted no claim of lien by it. This decision is not a holding that a signature is required as a matter of law. The case of *Broxton Artificial Stone Works vs. Jowers,* 4 Ga. App. 91, supra, rather than being the contrary of what we here rule, is in accord therewith. The claim of lien in that case recited "the undersigned *Broxton Artificial Stone Works,* C. A. Tyler, Agent, claims a lien" etc. It was signed "C. A. Tyler." This court held" (2) The claim of lien is made by Broxton Artificial Stone Works, and the words 'C. A. Tyler, Agent,' contained in the claim of lien, and the signature 'C. A. Tyler,' attached to the claim of lien, are *surplusage.*" (Emphasis by the court.)

The real estate is described as the premises upon which the buildings and tanks were erected; described as "lying and being in the City of Carrollton, and being in the south half of land lot no. 251, 5th District, Carroll County, Georgia, and being the land upon which is constructed and erected the following buildings and tanks to wit," then follows a description of the buildings and tanks. This description was sufficient. *Broxton Artificial Stone Works vs. Jowers,* 4 Ga. App. 91, supra; *Hawkinsville & Western RR. Co. vs. Beckam,* 20 Ga. App. 431, 432(2) (93 SE2d 109); *Love vs. Hockenhull,* 91 Ga. App. 877 (87 SE2d 352).

The action asserting the lien was not defective because it was neither alleged nor shown that no personal security was taken by the plaintiff-claimant. The taking of personal security does not constitute a waiver of the lien given *materialman* under Code Section 67-2001. (Emphasis by the court.) *Chicago Building & Co. vs. Talbotton Creamery & Mfg. Co.,* 106 Ga. 84(3) (31 SE2d 809) and *Allen vs. Arrow Contracting Co.,* 110 Ga. App. 369, 371(4) (138 SE2d 600) in which *Latham Plumbing & Heating Co. vs. Ledbetter Trucks, Inc.,* 96 Ga. 219, supra, holding such an allegation necessary was in effect overruled, and *Royal vs. McPhail,* 97 Ga. 457 (25 SE2d 512) was distinguished.

The parties stipulated "that plaintiff's materialman's lien was duly recorded on October 12, 1971" and "that the last lienable materials placed by plaintiff upon defendant property occurred on or about September 9, 1971, and that such materials consisted of paint, solvent and coating," and further stipulated that such materials were an integral part of the original contract between the contractor and the sub-contractor and the sub-contractor, which materials were furnished by plaintiff when plaintiff completed the sub-contractor's contract some several months after furnishing metal for the tanks when the sub-contractor got in financial difficulties. Under these circumstances the stipulated facts showed the claim of lien was recorded within the

time required by statute, three months after the last material was furnished. Code Section 67-2002 (2). *Pippin vs. Owens,* 29 Ga. App. 789 (1) (116 SE 549). The case of *Crane Co. vs. Hirsch,* 61 Ga. App. 632 (7 SE2d 83) relied on by appellants was one in which materials were furnished to a plumbing contractor on two separate contracts. First, one with the owner for a heating installation, and after that was completed, one with a lessee for certain plumbing repairs. This court held that the delivery time for the last materials furnished the plumber under the second contract, could not be used as the time of delivery of the last materials under the first contract, and that the recording of the lien for materials under the first contract came too late. That case has no application here.

In answer to the allegation of plaintiff's complaint that it was entitled to a lien in the full sum of $22,921.07 for furnishing materials used in the construction and erection of the improvements, the defendants, in their answer denied "that plaintiff is entitled to a lien in any amount." Apparently, in stipulating the facts on motion for summary judgment, there was some dispute as to whether the pleadings made an issue as to the amount of the lien. The stipulation reads as follows: "It is stipulated that Plaintiff furnished materials used for the improvement of Defendants' real estate, as described in Plaintiff's petition. Plaintiff maintains that no issue as to amount is raised by the pleadings; however, if the court finds same is controverted, then and in that event, the parties stipulate the fair market value of the materials furnished is and was Nineteen thousand seven hundred forty and no/100 Dollars ($19,740.00)." The lower court rendered a summary judgment for the amount sued for, making an express finding that the sum sued for was the value of the materials furnished. The defendants enumerated error stating that the lower court "erred in that the amount of the judgment was greater than the stipulated fair market value of the materials furnished by appellee for the improvement of appellant's real estate."

As we construe the stipulation, it applies only in the event the trial judge finds the amount alleged in the complaint is controverted by the pleadings. The trial judge made no such finding and he apparently found to the contrary when he found the fair market value of the materials furnished was $22,921.07, the amount sued for. However, it appearing there was no evidence produced as to the market value of the materials furnished and the burden being upon the plaintiff as the movant for summary judgment to prove the value of the materials furnished, we must hold the trial court erred in finding such amount as was found in the absence of evidence in support thereof, unless the pleadings show that the amount of the lien was admitted. As we construe the denial to the allegations of the petition, the denial that plaintiff was entitled to a lien in any amount means plaintiff was not entitled to a lien in the amount sued for or any other amount, and that under these circumstances, the amount of the lien was controverted.

We therefore, under the rulings above, affirm the trial judge in granting the summary judgment upholding the validity of the lien, but reverse him in granting the summary judgment in the amount found and remand the case to the trial court for further and proper determination as to this feature of the case.

Judgment affirmed in part, reversed in part.

Eberhardt, P. J., and Stolz, J., concur.

IN THE

COURT OF APPEALS OF GEORGIA

No. 47898

SOUTHWIRE COMPANY et al

Appellants

versus

METAL EQUIPMENT COMPANY

Appellee

On Motion For Rehearing

(May 9, 1973)

PER CURIAM: The motion for rehearing is denied.

IN THE

SUPREME COURT OF GEORGIA

No. 28116

SOUTHWIRE COMPANY et al

Petitioners

versus

METAL EQUIPMENT COMPANY

Respondent

Petition For Writ of Certiorari

(July 3, 1973)

PER CURIAM: The Petition for Writ of Certiorari is denied.

IN THE STATE COURT OF CARROLL COUNTY GEORGIA, CARROLLTON, GEORGIA

METAL EQUIPMENT COMPANY,	( )	
Plaintiff	(	CIVIL ACTION
vs.	)	FILE NUMBER 4017
SOUTHWIRE COMPANY and SOUTHWIRE REALTY COMPANY,	( )	
Defendants	( )	

This case having come on for hearing, pursuant to the Rule Nisi on September 30, 1972; and said case having been called in its order. and after considering the stipulated facts submitted by the parties together with all exhibits mentioned therein, being plaintiff's exhibits 1 and 2 and defendants' exhibits A, B, and C. each of which five exhibits was tendered and admitted into evidence; and after hearing testimony and considering plaintiff's exhibit 3. a certified copy of bond by defendants and made a part of the records by defendants;

AND, after consideration of plaintiff's Motion for Summary Judgment in its favor, and consideration of defendants' Motion for Summary Judgment in its favor, and after review and consideration of memoranda submitted by counsel;

The Court finds as fact the following:

1. Plaintiff furnished materials to defendants used in the construction and erection of buildings and tanks upon defendants' real estate;

2. The fair market value of such materials furnished was $22,921.07;

3. No portion of said $22,921.07 has been received by or for plaintiff in payment therefor;

4. The description of the land as stated in the materialmens lien sufficiently identifies the real estate upon which said materials were placed;

5. The uncontroverted facts, numbered A through N, inclusive, mutually submitted by the parties are true and correct;

6. That the placement of lienable materials upon defendants' property on September 9, 1971 was less than ninety days before October 12, 1971, when plaintiff's lien was recorded;

7. That there is no genuine issue as to any material fact regarding said above captioned case.

It is therefore CONSIDERED, ORDERED, and ADJUDGED that defendants' Motion for Summary Judgment is hereby denied; plaintiff's Motion for Summary Judgment is hereby granted and it is ORDERED and ADJUDGED that plaintiff, Metal Equipment Company do have and recover against defendants, Southwire Company and Southwire Realty Company, jointly and severally the sum of $22,921.07, with lawful interest at seven percent per annum, besides costs of court.

AND IT IS SO ORDERED AND ADJUDGED

This 12th day of October, 1972

Robert J. Brown
Judge
State Court of
Carroll County

18

IN THE STATE COURT OF CARROLL COUNTY
GEORGIA, CARROLLTON, GEORGIA

METAL EQUIPMENT COMPANY, (
CIVIL ACTION
Plaintiff
) FILE NUMBER 4017
vs.
SOUTHWIRE COMPANY and (
SOUTHWIRE REALTY COMPANY,

Defendants

NOTICE OF MOTION

TO: Southwire Company and Southwire Realty Company, and Mr. Van C. Wilks and Mr. Donnie R. Sloan, Jr., 126 Fertilla Street, Carrollton, Georgia, their attorneys

Please take notice that the undersigned has filed the within motion and same will be heard before the Court at _____ o'clock ____M. on the _____ day of _____, 1972 at the courthouse in Carrollton, Georgia.

18 Alabama Street
Tallapoosa, Georgia

HOWE and HOWE

_____
Donald B. Howe, Jr.

_____
E. B. Jones, Jr.
Attorneys for Plaintiff

Bremen, Georgia

IN THE STATE COURT OF CARROLL COUNTY
GEORGIA, CARROLLTON, GEORGIA

METAL EQUIPMENT COMPANY,

Plaintiff

vs.

SOUTHWIRE COMPANY and
SOUTHWIRE REALTY COMPANY,

Defendants

CIVIL ACTION

FILE NUMBER 4017

NOTICE OF MOTION

TO: Southwire Company and Southwire Realty Company, and Mr. Van C. Wilks and Mr. Donnie R. Sloan, Jr., 126 Fertilla Street, Carrollton, Georgia, their attorneys

Please take notice that the undersigned has filed the within motion and same will be heard before the Court at _____ o'clock ___M. on the _____ day of _____ _____, 1972 at the courthouse in Carrollton, Georgia.

18 Alabama Street
Tallapoosa, Georgia

HOWE and HOWE

Donald R. Howe, Jr.

Hiram, Georgia

E.B. Jones, Jr.
Attorneys for Plaintiff

IN THE STATE COURT OF CARROLL COUNTY
GEORGIA, CARROLLTON, GEORGIA

METAL EQUIPMENT COMPANY,	(	
	(	
Plaintiff	(	CIVIL ACTION
	(	
vs.	(	FILE NUMBER 4017
	(	
SOUTHWIRE COMPANY and	(	
	(	
SOUTHWIRE REALTY COMPANY,	(	
	(	
Defendants	(	

MOTION FOR SUMMARY JUDGMENT

Plaintiff, METAL EQUIPMENT COMPANY moves the Court to enter a summary judgment in its favor upon the grounds that there is no genuine issue as to any material fact, and that the plaintiff, Metal Equipment Company is entitled to judgment in its favor as a matter of law.

This motion is based upon, and this plaintiff relies for support upon the following:

(a) The pleadings in this case;

(b) The stipulation of fact made and entered into by the parties on August 25, 1972, together with plaintiff's exhibit numbers 1 and 2 appended thereto, all of which has been duly filed as a part of the record in this case.

WHEREFORE, Plaintiff prays that this motion be sustained and that a summary judgment be entered in favor of Appellant, Metal Equipment Company.

Respectfully submitted,

Bremen, Georgia

E. B. Jones, Jr.
HOWE and HOWE

18 Alabama Street
Tallapoosa, Georgia

I, Donald B. Howe, Jr. certify that I am of counsel for Metal Equipment Company, and that I have served a copy of the above and foregoing motion, rule nisi, and notice of motion upon the defendants by mailing a copy thereof to Mr. Van C. Wilks and Mr. Donnie R. Sloan, Jr., 126 Fertilla Street, Carrollton, Georgia 30117, defendants' attorneys, in a properly addressed envelope with sufficient postage thereon, before the filing of said motion.

This _____ day of _____, 1972.

Donald B. Howe, Jr.

IN THE STATE COURT OF CARROLL COUNTY
GEORGIA, CARROLLTON, GEORGIA

METAL EQUIPMENT COMPANY,	(	
	(	
Plaintiff	(	CIVIL ACTION
	(	
vs.	(	FILE NUMBER 4017
	(	
SOUTHWIRE COMPANY and	(	
	(	
SOUTHWIRE REALTY COMPANY,	(	
	(	
Defendants	(	

MOTION FOR SUMMARY JUDGMENT

Plaintiff, METAL EQUIPMENT COMPANY moves the Court to enter a summary judgment in its favor upon the grounds that there is no genuine issue as to any material fact, and that the plaintiff, Metal Equipment Company is entitled to judgment in its favor as a matter of law.

This motion is based upon, and this plaintiff relies for support upon the following:

(a) The pleadings in this case;

(b) The stipulation of fact made and entered into by the parties on August 25, 1972, together with plaintiff's exhibit numbers 1 and 2 appended thereto, all of which has been duly filed as a part of the record in this case.

WHEREFORE, Plaintiff prays that this motion be sustained and that a summary judgment be entered in favor of Appellant, Metal Equipment Company.

Respectfully submitted

HOWE & HOWE
LAWYERS
TALLAPOOSA, GA.

Brosen, Georgia

E.B. Jones, Jr.

HOWE and HOWE

18 Alabama Street
Tallapoosa, Georgia

I, Donald B. Howe, Jr. certify that I am of counsel for Metal Equipment Company, and that I have served a copy of the above and foregoing motion, rule nisi, and notice of motion upon the defendants by mailing a copy thereof to Mr. Van C. Wilks and Mr. Donnie R. Sloan, Jr., 126 Fertilla Street, Carrollton, Georgia 30117, defendants's attorneys, in a properly addressed envelope with sufficient postage thereon, before the filing of said motion.

This _____ day of _____, 1972.

_____
Donald B. Howe, Jr.

HOWE & HOWE
LAWYERS
TALLAPOOSA, GA.

RULE NISI

The foregoing motion for summary judgment having been presented to me, it is ORDERED that the defendants, Southwire Company and Southwire Realty Company, be served with a copy of this motion and order, by serving their counsel, Mr. Van C. Wilks and Mr. Donnie R. Sloan, Jr., 126 Fertilla Street, Carrollton, Georgia 30117, and let them show cause if any they have, at Chambers in the State Court of Carroll County, Carrollton, Georgia on the _____ day of _____, 1972 at _____ o'clock ____M. why said motion should not be granted.

This _____ day of

_____, 1972

_____

Judge
State Court
Carroll County, Carrollton
Georgia

RULE NISI

The foregoing motion for summary judgment having been presented to me, it is ORDERED that the defendants, Southwire Company and Southwire Realty Company, be served with a copy of this motion and order, by serving their counsel, Mr. Van C. Wilks and Mr. Donnie R. Sloan, Jr., 126 Fertilla Street, Carrollton, Georgia 30117, and let them show cause if any they have, at Chambers in the State Court of Carroll County, Carrollton, Georgia on the _____ day of _____, 1972 at _____ o'clock _____M. why said motion should not be granted.

This _____ day of

_____, 1972

_____

Judge
State Court
Carroll County, Carrollton
Georgia

HOWE & HOWE
LAWYERS
TALLAPOOSA GA

CERTIFICATE OF SERVICE

This is to certify that copies of this Petition and Appendix were served upon Respondent through its attorneys of record in accordance with Rule 33 of the Supreme Court of the United States' revised rules, on September 27, 1973.

Van C. Wilks
P. O. Box 1000
Carrollton, Georgia 30117
Attorney for Petitioners

SUPREME COURT, U. S.

FILED

OCT 18 1973

MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-570

SOUTHWIRE COMPANY and SOUTHWIRE REALTY COMPANY,
Petitioners,

vs.

METAL EQUIPMENT COMPANY,
Respondent.

BRIEF OF RESPONDENT OPPOSING PETITION FOR WRIT OF CERTIORARI AND MOTION FOR AWARD OF DAMAGES FOR DELAY CAUSED BY APPEAL

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F. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, 421-3030

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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-570

SOUTHWIRE COMPANY and SOUTHWIRE REALTY COMPANY,

Petitioners,

vs.

METAL EQUIPMENT COMPANY,

Respondent.

BRIEF OF RESPONDENT OPPOSING PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinions of the Georgia Appellate Courts appear in the Appendix to Petition for Writ of Certiorari.

JURISDICTION

Respondent does not question the jurisdiction, as such, as set forth in the petition.

QUESTIONS PRESENTED

The petitioners set forth no proper question for review in that no ruling has ever been made upon petitioners' grievance by any court below.

CONSTITUTIONAL PROVISIONS INVOLVED

Respondent makes no objection to petitioners' statement of the constitutional provisions involved.

STATEMENT OF THE CASE

Petitioners' statement of the case is substantially correct. However, petitioners state they had no notice of a hearing before the State Court of Carroll County, Georgia which resulted in judgment in favor of respondent against petitioners. This allegation denying notice simply is not true; there is nothing anywhere in the record to support such allegation, and same is denied by respondent.

No objection was ever made to the State Court of Carroll County following the summary judgment granted to respondent, because of lack of notice or otherwise. That Court never ruled on a motion for rehearing, motion to set aside the judgment, or any other motion or objection whatsoever, because none was made. Petitioners first made their allegation that they had received no notice of hearing in their brief to the Court of Appeals of Georgia. (See opinion of Georgia Court of Appeals, at p. 9 of Petition). It is a bare allegation, which is simply false, and no court in this state has ever had the question properly brought before it.

REASONS FOR NOT GRANTING THE WRIT

Respondent has no quarrel with petitioners' position that judgments taken against any person without any opportunity to be heard are improper, void, and unconstitutional. However, no court in the State of Georgia has ever ruled that petitioners were not denied notice of the hearing, nor has any court of this state ever sanctioned petitioners' allegation that judgment was entered against them as a result of a hearing without notice.

The Court of Appeals of Georgia, in its opinion reported as shown on page 9 in the petition disposed of the matter sought to be brought before this Honorable Court as follows:

"The record shows service of a motion and rule nisi for summary judgment by plaintiff upon defendant's attorney. The record further shows a stipulation of facts to be used on the hearing. The claim, made for the first time in this court, that the copies served upon the defendants' attorney were not filled in as to the time of hearing and for that reason defendants' attorney was not notified of the time of hearing, is not supported by the record and will not be passed upon in this Court."

The petition for certiorari contains nothing other than the unsupported allegation that a judgment adverse to petitioners was granted without notice to petitioners—utterly unsupported by the record, and never ruled upon by any court below—together with citations supporting the proposition that such procedure, which is denied by respondent, is unconstitutional.

Respondent can not respond in any way other than to deny the allegation itself. There is no legal issue and no decision below, concerning the constitution or otherwise, for this court to decide or correct.

CONCLUSION

Respondent therefore respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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MOTION FOR AWARD OF DAMAGES FOR DELAY CAUSED BY APPEAL

Respondent upon its brief, filed herewith, in opposition to the granting of the petition for writ of certiorari, moves the Court for an award of damages pursuant to Rule 56 (4) of the Rules of this Court, if the petition for writ of certiorari be denied, upon the ground that it is manifest that there was no ground for granting such a writ. The amount in controversy is $19,740.00 (p. 12, Petition).

DONALD B. HOWE, JR.
Of Counsel for Respondent

CERTIFICATE OF SERVICE

This is to certify that copies of this brief and motion for award of damages were served upon petitioners through its attorneys of record in accordance with Rule 33 of the Supreme Court Rules, on October 16, 1973, by mailing same to their attorneys of record in a properly franked envelope.

DONALD B. HOWE, JR.
Attorney for Respondent

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